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No. 06-1576

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IN THE

Supreme Court of the United States

EM LTD. and NML CAPITAL, LTD.,

Petitioners,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does a foreign state's authorization of its central bank to repay the state's debt to the International Monetary Fund (the "IMF") expose central bank reserves to attachment or execution by the state's judgment creditors, regardless of whether the particular reserves sought to be attached were used, or intended to be used, for this purpose?

(2) Does a district court abuse its discretion in refusing to permit discovery from a foreign state and its non-party central bank in connection with a motion to attach the central bank's reserves when no discovery requests were served, the party seeking the attachment only alludes to a desire for discovery in its brief below and then disclaims the need for it, and discovery would not change the court's holding that the property at issue is immune from attachment or execution, but would intrude upon the sovereignty of the foreign state?

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SUMMARY OF THE ARGUMENT

This case concerns the attempt by two holdout creditors of the Republic of Argentina (the "Republic") to attach and restrain foreign reserves of the Republic's central bank, Banco Central de la República Argentina ("BCRA"), held in BCRA's accounts at the Federal Reserve Bank of New York (the "FRBNY"). Petitioners EM Ltd. ("EM") and NML Capital, Ltd. ("NML") concede, as they must, that those reserves would ordinarily be central bank property immune from attachment and execution under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (the "FSIA"). *See* Pet. 13, 14; App. 18a. They contend, however, that BCRA's reserves at the FRBNY became attachable assets of the Republic when the President of Argentina issued two executive decrees (collectively, the "Decrees") that authorized BCRA to use a portion of its reserves for repayment of the Republic's debt to the IMF, with the Republic's reimbursement of BCRA due at a later date. Pet. 3-4. The court of appeals rejected this "appropriation" argument, App. 19a, and held that the reserves on deposit at the FRBNY that petitioners sought to attach at all times remained property of BCRA. It also concluded, as an alternative holding, that a foreign state's relationship with the IMF is not "commercial activity" within the meaning of the FSIA, that repayment of the state's borrowings from the IMF with central bank reserves is therefore not "use" of that property for a commercial activity so as to subject those reserves to execution under § 1610(a) of the FSIA even if they were property of the state, and that the attached reserves at the FRBNY were not in any event used for, or designated for use, for that purpose.

BCRA's separate opposition sets forth the reasons why its reserves are protected from attachment and execution under the FSIA and cannot be used to satisfy judgments

against the Republic, and why the unique and unlikely to be repeated question of the effect of the Argentine Decrees on the ownership of BCRA's property (and petitioners' other questions based on the court of appeals' alternative holdings) are unworthy of this Court's discretionary review on certiorari. The Republic joins in BCRA's position, but writes separately in opposition to the Petition to highlight the errors and omissions in EM and NML's presentation of the factual and procedural background of these cases, as well as to show that the purported circuit split on a discovery issue raised at the eleventh hour by one of the petitioners, EM, is wholly invented and patently not worthy of a writ of certiorari. *See* Sup. Ct. R. 15(2).

BACKGROUND

A. The Republic's Economic Crisis And The Sovereign Debt Restructuring Process

Between 1998 and 2002, the Republic experienced the worst economic crisis of its modern history, marked by an enduring recession, fiscal imbalance, and lack of access to the international capital markets. *See* Decl. of Noemi C. LaGreca, dated June 11, 2003 ¶¶ 4-13, *EM Ltd. v. Republic of Argentina*, 03 Civ. 2507 (TPG) (S.D.N.Y.); Decl. of Federico Carlos Molina, dated Mar. 24, 2005 ("Molina Decl.") ¶ 3, *NML Capital, Ltd. v. Republic of Argentina*, 03 Civ. 8845 (TPG) (S.D.N.Y.); *see also* Paul Blustein, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA 1 (2005) (describing collapse of Argentine economy in 2001 as "one of the most spectacular in modern history"). As a result of declining exports because of fixed exchange rates, rising interest rates and declining tax collections, the Argentine state was

essentially bankrupt. With its economy in ruins, the country suffered social and political turmoil: riots in the streets of Buenos Aires left dozens dead and four presidents resigned within a two-week period. Blustein, *supra*, at 1, 185-87.

By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden—some $80 billion in public external debt alone—while maintaining basic governmental services necessary for the health, welfare, and safety of the Argentine populace. "[U]nable to service its debt," the Republic was forced to defer interest and principal payments to its bondholders. Panel of Independent Advisors, *Economic and Financial Issues Facing Argentina*, IMF News Brief No. 02/80, July 29, 2002, ¶ 1, *available at* http://www.imf.org/external/np/sec/nb/2002/nb0280.htm; Molina Decl. ¶ 4. This "refusal to make scheduled payments" under these extreme circumstances was not an arbitrary decision by the Republic not to pay its debts, as EM and NML charge. Pet. 2. Just as the United States Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), neither were the terms of the Republic's agreements with its external debt holders. Like many nations over the course of history that have had to restructure their debt in times of economic crisis, including the United States in the early days of the Constitution, *see generally* Forrest McDonald, ALEXANDER HAMILTON: A BIOGRAPHY 163-88 (1982), the Republic was forced to seek restructuring of both its external and internal public debt.

Of course there is no bankruptcy regime for insolvent states, so the Republic's external debt restructuring was necessarily on an entirely voluntary basis. The Republic did not repudiate that debt. Instead, consistent with United States government policy favoring the orderly and consen-

sual restructuring of sovereign debt, the Republic restructured its unsustainable debt load in 2005 through a global exchange offer in which participating bondholders exchanged old, nonperforming bonds for new, performing bonds with lower interest rates, reduced principal, and/or longer maturities. The exchange offer was extended to all beneficial owners of eligible bonds on the same terms and reflected the Republic's commitment to treat its private creditors equitably.[1] Approximately $62.5 billion in principal amount, or over 76% of the aggregate eligible debt, was tendered in the exchange offer, making it the largest sovereign debt restructuring in history. Molina Decl. ¶ 7.[2]

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[1] EM and NML's criticism of the Republic for not "offer[ing] anything to bondholders that did not accept its exchange offer," Pet. 2, is hardly fair. Petitioners and other holdout creditors had the opportunity to participate in the exchange offer, which they chose to reject and indeed attempted through litigation to block other creditors from accepting. The Republic's announcement that it would not resume payments on non-tendered bonds was critical to the success of the exchange offer, as bondholders would not agree to incur substantial "haircuts" on their holdings if there were a reasonable possibility that non-tendering bondholders would be voluntarily paid in full at some later date.

[2] The Republic therefore did not "walk away from [its] legal and financial obligations," as petitioners and their partisan commentators would have it. Pet. 9 (quoting Arturo C. Porzecanski, *From Rogue Creditors to Rogue Debtors: Implications of Argentina's Default*, 6 CHI. J. INT'L L. 311, 316 (2005)). Professor Porzecanski's bias against insolvent sovereign debtors is clear from his far from scholarly rhetoric, which maligns them as not only "rogue" debtors "that pose the greatest threat to the integrity and efficiency of the international financial architecture" but also as "sovereign deadbeat[s]." Porzecanski, *supra*, at 331. Professor Hal S. Scott, whom petitioners also cite at length, *see* Pet. 12, 24, upon information and belief, has been for the last several years a paid consultant to certain sovereign creditors, including the parent of NML.

B. Petitioners Chose Not To Participate In The Republic's Debt Restructuring

EM and NML are Cayman Islands entities set up by creditors that are in the business of buying distressed sovereign debt and subsequently speculating in litigation against the issuing states.[3] Both acquired beneficial interests in Republic bonds at a deep discount immediately before and after the Republic suspended payments on its unsustainable external debt in December 2001; NML has in fact continued, as recently as March 2007, to buy nonperforming Republic debt and then bring suit for nonpayment. Their business strategy seeks to take advantage of the fact that, as noted above, insolvent sovereigns, unlike private borrowers, cannot invoke the protection of a bankruptcy regime; the Republic has no recourse to an automatic stay of litigation or protection from enforcement procedures as a private debtor would, and interest on judgments against the Republic continues to run indefinitely rather than stopping on the date of a bankruptcy filing.

Because EM and NML's business strategy depends upon aggressive litigation, they have not surprisingly engaged in

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[3] *See, e.g., CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Central do Brasil*, 886 F. Supp. 1105, 1107-08 (S.D.N.Y. 1995) (describing attempt to interfere with Brazil's debt restructuring by owner of EM); *see also Elliott Assocs., L.P. v. Republic of Peru*, 12 F. Supp. 2d 328, 331-32, 355-56 (S.D.N.Y. 1998) (describing sovereign debt litigation by parent of NML and holding that its acquisition of Peru's defaulted debt violated New York champerty law), *rev'd sub nom. Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363, 381 (2d Cir. 1999) (holding that creditor did not violate champerty law); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law. 635, 635-36 (ABA Publ'ns Feb. 2001) (describing Elliott's attachment of payments to be made by Peru on restructured debt).

a series of previous attachment and execution efforts against the Republic. NML obtained *ex parte* attachments of diplomatic and military property of the Republic in early 2004, and both petitioners made *ex parte* attempts to attach the bonds tendered in the Republic's exchange offer in the first half of 2005. Courts rejected each of these efforts. *See EM Ltd. v. Republic of Argentina*, 131 Fed. Appx. 745, 746-47 (2d Cir. 2005) (affirming vacatur of attachments of tendered bonds); *NML Capital, Ltd. v. Republic of Argentina*, No. 04-0197 (CKK), slip op. at 1 n.2 (D.D.C. Aug. 3, 2005) (quashing *ex parte* writs of attachment of diplomatic property). In December 2005, EM and NML attached, again on an *ex parte* basis, BCRA's reserves at the FRBNY; the district court's vacatur of these attachments was affirmed by the court of appeals in the decision that is the subject of their instant petition. More recently, in a separate proceeding in September 2006, EM and NML moved to attach the same reserves under an alter ego theory; that motion is fully briefed and pending before the district court.

EM and NML repeatedly complain that they cannot enforce judgments against the Republic because the Republic has "secrete[d] and shield[ed] its assets to prevent bondholders from using legal process to obtain the amounts they are owed," Pet. 2; *see also id.* at 11, 12, but as the foregoing description makes clear, their lack of success has been due to the federal courts' decisions that their enforcement efforts have violated the limits of the FSIA or are otherwise improper. When Congress crafted the FSIA, it decided to limit the scope of execution on a foreign state's property to a significantly greater extent than it limited the scope of jurisdiction over *in personam* suits against foreign states. *Compare* 28 U.S.C. § 1605 *with id.*

§§ 1609-1611; *see Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002); *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *see also* H.R. Rep. No. 94-1487, at 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626.

These Congressional decisions in the FSIA necessarily impact EM and NML's chosen business strategy of litigating against states. EM and NML are free to sue the Republic, or any other sovereign in financial distress, and obtain judgments that they can try to enforce. Their ability to execute upon a judgment, however, is significantly constrained by the FSIA's limitations on the seizure of a foreign state's property. As discussed in BCRA's brief, attachment and execution under the FSIA are limited to property of a foreign state that is in the United States and used for a commercial activity in the United States. *See* 28 U.S.C. §§ 1609, 1610(a); Br. of Banco Central de la República Argentina in Opp'n to Pet. for Writ of Certiorari ("BCRA Br.") at 18-22. Property of a foreign central bank held for its own account, which the district court correctly held to include BCRA's reserves at the FRBNY, enjoys even greater protections. *See* 28 U.S.C. § 1611(b)(1); BCRA Br. at 26-27. EM and NML, which have chosen to make a business of buying and suing on distressed sovereign debt, can hardly complain about the fact that Congress has imposed obstacles to that business.

C. Petitioners' Previous Overbroad Discovery Demands

As another facet of their litigation strategy, EM and NML have pursued asset discovery of the Republic that is overbroad and inappropriate (since November 2003, in

EM's case). Asset discovery under the FSIA is limited to the narrow confines of a foreign state's property that is in the United States and used for a commercial activity in the United States, which is the only sovereign property that may be attached or executed against. EM and NML have nevertheless in the past sought discovery concerning property that does not belong to the Republic (*e.g.*, property of the Republic's agencies and instrumentalities such as BCRA, which are presumptively separate from the Republic and not liable for the Republic's debts), property of the Republic that is not in the United States, and property of the Republic that is not used for a commercial activity in the United States. In response to these earlier requests, BCRA, although not a party to petitioners' claims against the Republic, voluntarily provided detailed information regarding itself and movements of its reserves. *See* Decl. of Juan Basco, dated Mar. 14, 2005, ¶¶ 3-20, *EM Ltd. v. Republic of Argentina*, 03 Civ. 2507 (TPG) (S.D.N.Y.).

Ironically, despite these earlier efforts, in the proceeding below for which they seek certiorari review in this Court, EM and NML uncharacteristically sought no discovery and further argued that no discovery was necessary to adjudicate their claims. *See* App. 62a. The record contains no discovery requests by EM or NML—no interrogatories under Fed. R. Civ. P. 33, no document requests under Fed. R. Civ. P. 34, no notices of deposition under Fed. R. Civ. P. 30—because none were served. The thin reed on which petitioners' entire argument for discovery review by this Court rests is a "request" made in the concluding paragraph of their district court brief, effectively withdrawn by EM at oral argument, that the district court "leave the Attachments in place until Plaintiffs can obtain discovery and develop a complete record," and listing five possible top-

ics for such discovery. Mem. in Supp. of Pls.' Mot. to Confirm Attach. & Restraining Orders & in Opp'n to Mots. of Republic of Argentina & Banco Central de la Republica Argentina to Vacate those Orders, dated Jan. 10, 2006, at 28-29. At oral argument in the district court two days later, on January 12, 2006, EM did not pursue this throwaway request, but instead told the district court, "If you would like to later, we can talk about the specific discovery issues, but we don't think discovery is needed in order to confirm the attachments at this time." App. 62a. The district court, unsurprisingly, therefore did not even address any question of discovery in its oral ruling vacating the *ex parte* attachments.

When EM, but not NML, later raised the district court's supposed denial of discovery on appeal, the court of appeals noted that there was no "part of the record demonstrating that these specific requests were made to the District Court," App. 10a-11a, as the only place these "requests" had been made was in the district court brief. It went on to hold, on this issue, that "in the FSIA context, 'discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.' *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir.1998) (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992))," and that "[b]ecause the record makes clear that the FRBNY Funds were never an attachable asset of the Republic and that § 1610's commercial activity exception to immunity from attachment does not apply, . . . [t]here is no indication on this record that the District Court improperly calibrated the delicate balancing between permitting discovery to substantiate exceptions to statutory foreign

sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery." App. 39a-40a (quotation marks and citations omitted).

ARGUMENT

PETITIONERS DID NOT SERVE DISCOVERY DEMANDS IN THE DISTRICT COURT AND THERE IS NO CIRCUIT SPLIT OR OTHER BASIS THAT WARRANTS REVIEW OF THE COURT OF APPEALS' DISCRETIONARY DISCOVERY RULING

BCRA's separate brief demonstrates why EM and NML's attempt to attach BCRA's reserves at the FRBNY to satisfy their claims against the Republic was in violation of the FSIA and long-established caselaw. BCRA Br. at 11-28. No discovery was necessary for the district court and the court of appeals to reach this legal conclusion, which is fully supported by the plain language of the Decrees. *See* App. 21a ("Plaintiffs' arguments concerning ownership of, and control over, the FRBNY Funds are not supported by the Decrees. . . . [T]he Decrees . . . did not cause control of BCRA's assets to change from BCRA to the Republic.").

Having mistakenly relied on the Decrees as sufficient to make their case for the attachment of BCRA's reserves, EM and NML now invoke due process concerns arising from the Second Circuit's purported "denial of all discovery." Pet. 9; *see also id.* at 25 (characterizing decision below as "holding that petitioners were entitled to *no discovery at all*") (emphasis in original), 26 (court of appeals

"denied not only full discovery but *all discovery*") (emphasis in original). Petitioners' hyperbole seriously mischaracterizes the actual course of events, which shows that their assertion that they "were not permitted to develop" the record below, Pet. 9, is wholly misplaced.

EM claims that it sought certain evidence "in discovery," Pet. 25, and the Petition also repeats the mantra that EM and NML did not receive discovery to which they were "entitled," implying that they actually sought discovery in connection with their application and that this discovery was erroneously denied. *Id.* at 2 (claiming Second Circuit held "that petitioners were not entitled to discovery to show that [the attached funds were property of the Republic]"), 9 ("[T]he court of appeals held that petitioners were not entitled to limited discovery to fill [alleged gaps in the record]."), 10, 25, 26, 27, 28, 30. In fact, neither EM nor NML formulated or served so much as a single interrogatory or document request concerning the Decrees. To the contrary, EM explicitly disavowed any need for discovery, stating to the district court that "we don't think discovery is needed in order to confirm the attachments." App. 62a. Indeed, because EM did not and could not cite "any part of the record demonstrating that [specific discovery] requests were made to the District Court," while the district court transcript showed that its counsel had assured the court that EM should prevail without discovery, the court of appeals was left to "assume *arguendo* that, as represented by EM, these requests were made." App. 10a-11a n.5. This is hardly a record on which petitioners can expect this Court to act as a magistrate judge to decide discovery matters that were never pursued, much less treat the lower

courts' rulings as raising a "due process" issue of constitutional dimensions.[4]

Even if EM had properly requested the discovery that the court of appeals assumed *arguendo* that it did, rather than at best alluding to it in passing in its district court brief, this discovery would have been properly denied. Petitioners seem wholly to disregard the fact that the scope of appellate review of discovery rulings is abuse of discretion, *see Simmons v. United States*, 390 U.S. 377, 387-88 (1968), which no doubt accounts for the paucity of discovery disputes that ever make their way to this Court on certiorari. Where such disputes are worthy of review, it is because they implicate major concerns or issues of law. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 513 (1947) (attorney work product privileged from discovery; problem raised by case had caused "wide-spread controversy among the members of the legal profession"). Here, no such error can plausibly be claimed, since the court of appeals' ruling was fully consistent with FSIA law regarding the scope of discovery relating to foreign states.

Under the FSIA, the only property against which petitioners may execute their judgments is property of the Republic that is in the United States and used for a com-

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[4] The absence of specific discovery requests by either EM or NML of course distinguishes this case from several of the lower court cases cited by petitioners. *See First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 50 (2d Cir. 2002) (subpoena duces tecum); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 174 (2d Cir. 1998) (interrogatories, document requests, and subpoena); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1472 (9th Cir. 1992) (discovery requests and interrogatories); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448 (6th Cir. 1988) (motion to compel discovery).

mercial activity in the United States. 28 U.S.C. §§ 1609, 1610(a). Section 1610(a)'s substantive limits on execution are in turn the touchstone for determining the relevance of any request for discovery in the post-judgment context. It is well settled in the lower courts that sovereign immunity protects a foreign state from the attendant burdens of litigation, including the burdens of discovery. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir.) ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation."), *cert. denied*, 531 U.S. 979 (2000); *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). Where discovery is permitted under the FSIA, comity concerns "require a delicate balancing 'between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery.'" *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998) ("*Rafidain I*") (quoting *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.), *cert. denied*, 506 U.S. 956 (1992)); *see also First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 54 (2d Cir.) ("*Rafidain II*") (advising that "courts should proceed with care in pursuing the assets of foreign governments and their instrumentalities"), *cert. denied*, 537 U.S. 813 (2002).

In view of these comity considerations, the Second Circuit, like its sister circuits, has made it clear that discovery against sovereigns must be "'ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination.'" App. 39a (quoting *Rafidain I*, 150 F.3d at 176); *accord Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007); *Conn.*

Bank, 309 F.3d at 260 n.10. Plaintiffs therefore are not entitled to discovery that is not designed to verify specific facts alleged to establish an exception to immunity under the FSIA. *Kelly*, 213 F.3d at 852 (plaintiffs not entitled to discovery where they had failed "to allege specific facts crucial to immunity which demonstrated a need for discovery").

EM and NML grudgingly accept these limitations on jurisdictional discovery, but argue that no limits apply once a court's jurisdiction over a foreign state is established. *See* Pet. 9, 26. This argument, although petitioners elide the point, would of course not apply to BCRA, over which jurisdiction was never established, and could not be established given the language of the Decrees. *See* App. 40a. And although the district court does have jurisdiction over the Republic, the courts of appeals have uniformly applied the same standards for jurisdictional discovery against a foreign state to post-judgment discovery proceedings. *See Af-Cap*, 475 F.3d at 1096 (post-judgment); *Conn. Bank*, 309 F.3d at 260 n.10 (post-judgment). If anything, the limits are more stringent in the post-judgment context, because the FSIA—even when the foreign state waives immunity—provides for *narrower* exceptions to immunity to execution than to jurisdiction. *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626 (Congress intended §§ 1610(a) and (b) to only "*partially* lower[] the barrier of immunity from execution," in a similar manner to, but to a lesser extent than, exceptions to immunity from jurisdiction) (emphasis added); *see also De Letelier*, 748 F.2d at 799 ("[S]ince it was not Congress' purpose to lift execution immunity wholly and completely, a right without a remedy does exist in [certain] circumstances."). Thus, discovery in aid of execution follows the

statute's substantive limitations on execution, and is limited to verifying the immunity of specific property whose amenability to execution has been drawn into genuine dispute.

There is no rule "[a]llowing 'full' post-judgment discovery against a sovereign debtor," much less a presumptively separate instrumentality such as BCRA that is not a party to the suit. Pet. 26 (quoting *Rafidain I* and *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992)).[5] The *Rafidain I* court did permit a plaintiff "to conduct full discovery against Rafidain," which was an instrumentality of the Republic of Iraq and also a judgment debtor, but this discovery was addressed to determining whether the district court had jurisdiction over another instrumentality of the Republic of Iraq that was allegedly Rafidain's alter ego. 150 F.3d at 177. Accordingly, *Rafidain I* is a jurisdictional immunity case that does not speak to the scope of a foreign state's immunity from asset discovery. Indeed, in a subsequent case, *Rafidain II*, the Second Circuit made clear that a foreign state's submission to post-judgment discovery "procedures and legal responsibilities associated with" its submission to jurisdiction exists "to the extent those procedures and responsibilities

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[5] EM and NML try to concoct a "circuit split" on the question whether "post-judgment creditors are in fact entitled to a full complement of discovery," Pet. 25-26, but all but one of the cases that they cite concern jurisdictional discovery or are completely inapposite. *E.g.*, *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (jurisdictional discovery). The exception is *Connecticut Bank*, where the discovery sought went directly to a central fact necessary to the immunity inquiry: whether the property at issue was used for commercial activity in the United States. *See* 309 F.3d at 251.

are related to its commercial activity in the United States." 281 F.3d at 53-54.

Richmark, upon which petitioners also rely, principally concerned a district court's imposition of sanctions when an instrumentality failed to comply with court-ordered discovery. 959 F.2d at 1471. The Ninth Circuit referred in passing to the fact that this discovery related to the instrumentality's assets located abroad, *id.* at 1471, 1478, but did not establish any rule that a court may order discovery against a foreign sovereign without regard to the limits of the FSIA, or discovery seeking information about property that is immune from execution under the FSIA. Fifteen years after *Richmark*, the Ninth Circuit agreed with the Fifth (and Second) Circuits that "discovery against a foreign sovereign should be ordered circumspectly and only to verify allegations of specific facts crucial to the immunity determination," *Af-Cap*, 475 F.3d at 1096 (quotation marks and citation omitted), effectively abrogating the *Richmark* court's dictum concerning a judgment creditor's "need[]" for discovery outside the limits of the FSIA.

EM's purported discovery requests concerned BCRA's reserves, which petitioners conceded would not be subject to execution unless the Decrees converted them from property of BCRA held for its own account into property of the Republic. App. 10a n.5, 18a. Once the district court and the court of appeals decided this legal question in favor of the Republic and BCRA, there were no "specific facts crucial to an immunity determination" that had to be verified. *Rafidain I*, 150 F.3d at 176; *cf. Phoenix Consulting*, 216 F.3d at 40 (discovery against sovereign defendant "should not be authorized at all if the defendant raises" different issue whose resolution "would impose a lesser burden

upon the defendant"). Rather, the discovery purportedly sought by EM explicitly called for confidential and sensitive information about, *inter alia*, the purposes of BCRA's reserves at the FRBNY and the Republic's plans for BCRA's reserves elsewhere, App. 10a n.5, which would go far beyond the appropriate limits of the FSIA and be offensive to any sovereign state. The court of appeals correctly recognized that EM and NML were not "entitled" to receive this information or to make the Republic and BCRA incur any additional "costs, in time and expense, and other disruptions attendant to litigation" concerning the reserves. *Kelly*, 213 F.3d at 849.

Finally, the Republic notes that under the district court's management of the bondholder cases against the Republic, EM and NML have already received more asset discovery than they are "entitled" to receive. The Republic has answered interrogatories concerning the identities of its agencies or instrumentalities engaged in commercial activity both inside and outside the United States, even though these entities are presumptively not liable for the Republic's debts under *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). *See id.* at 629. BCRA also voluntarily provided a declaration concerning its reserves in March 2005, more than nine months before EM and NML obtained *ex parte* attachment and restraining orders freezing BCRA's reserves at the FRBNY. Neither EM nor NML contested this discovery or sought any additional discovery before seizing the reserves. There was no violation of due process when the court of appeals rejected petitioners' claimed entitlement to discovery that was not necessary to decide the immunity of the reserves, and there is no reason whatever for this

Court to revisit the court of appeals' discretionary affirmance of the district court's not granting petitioners discovery that they never properly pursued before it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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